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Of Attorneys for Plaintiff Janette M. Wilken

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JANETTE M. WILKEN, an individual,

Plaintiff,

Case No. CV 06 195 ST

vs.

PLAINTIFF'S MOTIONS *IN LIMINE*

ORAL ARGUMENT REQUESTED

CASCADIA BEHAVIORAL
HEALTHCARE, INC., an Oregon non-
profit corporation,

Defendant.

Plaintiff moves the court *in limine* as follows:

1. Precluding defendant from offering any evidence on defendant's affirmative defenses to the Seventh Claim for Relief for regular and overtime wages.
2. Precluding defendant from offering any evidence related to plaintiff's alleged sexual contact unknown to defendant prior to termination and not in the presence of others.

1. This Court Should Preclude Defendant From Offering Evidence Supporting Affirmative Defenses In The Pre-Trial Order To Plaintiff's Wage And Overtime Claims

In the Pre-Trial Order, defendant alleged the following contentions in response to plaintiff's Seventh Claim for Relief for regular and overtime wages:

"Some or all of plaintiff's claims are barred by the doctrines of wavier (sic), estoppel, ratification, acquiescence, accord and satisfaction, settlement, consent, agreement, payment and release."

Pre-Trial Order at 12.

These contentions are apparently supported by contentions that plaintiff knowingly and/or voluntarily submitted to any alleged wage violation and knowingly failed to notify Cascadia that she was engaging in overtime work. Pre-Trial Order at 12.

Defendant should be precluded from offering evidence relating to these three contentions for two reasons. First, the parties litigated summary judgment motions as to plaintiff's wage and hour claims. This court has already established that defendant is liable to plaintiff for wage and overtime violations. In Magistrate Stewart's Findings and Recommendations she granted plaintiff's motion for summary judgment establishing "Cascadia's violation of ORS 653.261 and the Fair Labor Standards Act ("FLSA"), 29 USC § 207, by failing to pay Wilken regular and overtime wages for the period she was misclassified as exempt from February 9, 2004, to June 30, 2005..." Findings and Recommendations at 62 (August 10, 2007).

The only remaining issues on the wage and overtime claims are: the amount of wages due plaintiff and whether defendant is liable for liquidated damages, interest and penalties. Findings and Recommendations at 62-63. Defendant filed no objections to Magistrate

Stewart's Findings and Recommendations. Subsequently, the court accepted Magistrate Stewart's Findings and Recommendations. Opinion and Order (October 5, 2007).

If defendant had legal authority to support any of the 9 affirmative defenses to liability on the wage and overtime claims (and if defendant had evidence to support such defenses to liability) it should have been raised in response to plaintiff's motion for summary judgment and as an objection to Magistrate Stewart's recommendation of a finding of liability. Defendant did not offer any evidence or argument supporting any of these claimed affirmative defenses to liability in response to plaintiff's motion. As a result, all of these affirmative defenses to the wage and overtime claims have been waived. Defendant's liability for violation of wage and overtime laws is the law of the case.

Second, seven of the 9 affirmative defenses defendant placed in the Pre-Trial Order: ratification, acquiescence, accord and satisfaction, consent, settlement, agreement, payment and release were not pleaded in either defendant's Answer to the complaint or Answer to the amended complaint.¹ These affirmative defenses are barred because defendant failed to raise them in defendant's responsive pleading. See, FRCP 8(c)(1)(requiring party to affirmatively state in response to a pleading any avoidance or affirmative defense including accord and satisfaction, laches, payment, and release). Every defense to a claim for relief must be asserted in the responsive pleading if one is required other than those defenses set forth in FRCP 12(b).

///

¹ Defenses of waiver and estoppel are raised in both of defendant's responsive pleadings. See, Defendant's Eleventh Affirmative Defense.

Plaintiff does not consent to trying these new affirmative defenses which were not properly alleged as a part of defendant's Answer to the Complaint and the Amended Complaint.

This case was filed in February 2006. Defendant filed its Answer in April 2006. Plaintiff filed her Amended Complaint in January 2007. Defendant filed its Answer and Affirmative Defenses to the Amended Complaint in January 2007. Each party filed summary judgment motions in March 2006 which were decided in October 2007. As a result of plaintiff's Motion for Summary Judgment, plaintiff obtained partial summary judgment against defendant on wage and overtime claims. Plaintiff filed a second Motion for Summary Judgment in August 2007. Plaintiff's second Motion for Summary Judgment sought, and obtained, summary judgment against the affirmative defense of after acquired evidence of misconduct which defendant raised in defendant's Answer to the Amended Complaint. Plaintiff's second Motion for Summary Judgment was resolved in January 2008.

Plaintiff will be prejudiced by allowing these defenses to be added at this late stage of the case. The parties completed discovery and litigated three summary judgment motions prior to defendant's raising these affirmative defenses as a part of the pre-trial order. Plaintiff would be deprived of discovery and the opportunity to file motions for summary judgment (or compelled to further delay trial to seek discovery and litigate additional summary judgment motions), if these new affirmative defenses are permitted. Both options subject plaintiff to undue prejudice. Furthermore, defendant never attempted to raise these affirmative defenses in a procedurally proper manner by seeking leave to file an amended answer. Rather, defendant sought to raise these new affirmative defenses without seeking leave from the court.

Since these affirmative defenses were not timely raised and since adding them at this late date subjects plaintiff to undue prejudice, defendant should be precluded from offering evidence to support the new defenses.

Because plaintiff sought and obtained summary judgment establishing defendant's liability for wage and overtime violations and defendant offered no legal authority or evidence to support an affirmative defense to liability and because all but two of the claimed affirmative defense were not asserted in responsive pleadings or in a motion to amend, defendant should be precluded *in limine* from offering evidence to support the three contentions.

2. Precluding Defendant From Offering Alleged Evidence Of Sexual Contact Unknown Prior To Discharge And Outside The Presence Of Others

In defendant's Motion for Summary Judgment defendant sought to offer deposition testimony relating to alleged sexual contact between Ms. Wilken and Ms. Padilla at the workplace but not in the presence of others. Excerpts of the challenged deposition testimony are attached to this Memorandum. There are two instances of such contact which defendant sought to offer in litigating the summary judgment motions..

First, there was testimony in depositions that plaintiff and Ms. Padilla kissed on one occasion while alone in a locked bathroom on the premises at Cascadia in approximately January 2005. Wilken Dep 234, lines 20-22; 235, lines 1-13; Padilla Dep 47, lines 19-25; 48, lines 1-6.

Second, defendant offered deposition testimony and excerpts of a personal notebook the two women maintained of a second incident that occurred on the premises late after normal work hours ended between Ms. Wilken and Ms. Padilla in approximately May 2005.

With respect to the second incident, there was testimony in deposition that late after normal work hours while alone at work, the two women were making fun of the rules being imposed on them by their supervisors. Ms. Wilken sat on a desk to see if she could hide in a 3 inch space, Ms. Padilla walked towards her and spread her legs out exposing her clothed genital area and at that point the women decided they needed to take this home. Padilla Dep 65-66. Wilken Dep 260-261. Ms. Wilken testified that its possible that she may have touched Ms. Paddilla between her legs outside her clothing. Wilken Dep 261, lines 15-16.

With respect to both instances, the testimony and documents supporting each of the incidents should be excluded because both instances are irrelevant under FRE 401, because any marginal relevance of the evidence is outweighed by the prejudicial effect of both instances under FRE 403, because both instances are character evidence offered to show action in conformity therewith under FRE 404(b), because both instances are specific acts of conduct offered to attack the witness' character for truthfulness under FRE 608 and because defendant will be unable to satisfy its burden to show admissibility of such evidence under FRE 412.

Under FRE 401, the evidence is irrelevant to any issue in the case. With respect to plaintiff's claims of retaliation and discrimination, the portions of these claims that remain after summary judgment relate only to the adverse employment decision of plaintiff's termination in November 2005. See, Pre-Trial Order, Claims One through Four. On these termination claims, defendant "contends that plaintiff was terminated for taking home tax credit files." Pre-Trial Order, at 3. All of plaintiff's claims asserting that she was subjected to harassment or intentional infliction of emotional distress have been dismissed on defendant's motion for summary judgment. See, Findings and Recommendations at 63 (August 10, 2007)

(recommending dismissal of hostile workplace claims and intentional infliction claims).

Furthermore, the court ruled found that any different treatment of plaintiff by defendant, other than plaintiff's discharge, was not sufficiently severe to constitute an adverse employment decision. See, Findings and Recommendations at 44 (stating any claimed different treatment was not sufficiently severe to be an adverse employment decision).

Thus, the disputed factual issues on plaintiff's claims of retaliation and discrimination are whether plaintiff and Ms. Padilla made complaints of discrimination and whether defendant terminated plaintiff because of her complaints of discrimination, because of her lesbian relationship with Ms. Padilla or because took home tax credit files.

Neither of the incidents of alleged sexual contact has any tendency to prove whether defendant terminated plaintiff because she took her tax credit files. Because both of the incidents of claimed sexual contact were unknown to defendant prior to plaintiff's termination and because neither incident occurred in the presence of any other person, neither incident has any bearing on the factual issues in the case. The Ninth Circuit has held that "information about [plaintiff] which was unknown to [defendant] at the time the decision was made could not have entered into the calculus of the decision and would be entirely irrelevant. *Norris v City and County of San Francisco*, 900 F2d 1326, 1331 (9th Cir 1990). Thus, evidence of the two incidents is irrelevant to any issue in the case.

Neither of the incidents is relevant to any issue of after acquired evidence of misconduct. Defendant asserted an affirmative defense of after acquired evidence of misconduct unrelated to any allegations that there was sexual contact between the two women in these two incidents. However, the court granted plaintiff's second motion for summary judgment against

the after acquired evidence of misconduct claim. Thus, there is no affirmative defense in the case related to after acquired evidence.

Second, under FRE 412, if defendant attempts to offer evidence of sexual behavior or sexual predisposition to establish sexual misconduct, such evidence is subject to the more stringent rules of admissibility under FRE 412. FRE 412 switches the burden of showing admissibility to the party offering the evidence rather than to the party seeking to exclude the evidence. Additionally, FRE 412 raises the threshold for admissibility of the evidence by requiring the proponent to show that the probative value of the evidence substantially outweighs the specified dangers of the evidence. *BKB v Maui Police Dept.*, 276 F3d 1091, 1104 (9th Cir 2002).

These two incidents occurred either in a private setting or at a time when others were not present (in a locked bathroom and late in the evening after normal work hours). Thus, they have no bearing on what the women would do during work hours in the presence of others. The two incidents were remote in time from the termination occurring between six and ten months prior to termination. Further, the disputed issues in the case focus on whether defendant discriminated against plaintiff by terminating her employment for taking home tax credit files not on issues as to whether defendant terminated or disciplined plaintiff for inappropriate contact with her partner in the workplace.

Under FRE 403, if these two incidents have any marginal relevance, the relevance is outweighed by the unfairly prejudicial effect of the evidence. Defendant's arguments and evidence relating to both incidents are highly inflammatory and have the potential to unfairly prejudice a jury against plaintiff when weighed against any marginal relevance of the

evidence. There may be jurors who would be prejudiced against the plaintiff by hearing arguments focusing on descriptions of alleged sexual contact between two women. There may be jurors who believe that evidence of claimed misconduct unknown at the time of termination should influence the decision. There may be jurors who apply prejudices relating to such evidence in awarding the amount of damages. Thus, the evidence suggests an improper basis for a jury decision.


Finally, under FRE 404(b) and 608 the evidence is evidence of other wrongs offered to prove that plaintiff acted in conformity therewith on other occasions or the evidence is an attempt to attack plaintiff's character for truthfulness through specific incidents of conduct. Defendant will argue that if plaintiff engaged in some form of inappropriate contact in the workplace on these two occasions this evidence is relevant to show that plaintiff and Ms. Padilla engaged in different kinds of inappropriate contact in front of others in the workplace. Under FRE 404(b) and 608 this evidence is not admissible for such a purpose.

This court should preclude defendant from offering alleged evidence of sexual contact unknown prior to discharge or occurring outside the presence of others.

SUMMARY

For the reasons set forth above, this court should grant both of plaintiff's motions *in limine*.

DATED this 9th day of June, 2008.



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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JANETTE M. WILKEN, an
individual,

Plaintiff,

v.

CASCADIA BEHAVIORAL
HEALTHCARE, INC., an Oregon
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Defendant.

No. 06195 ST

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VIDEOTAPED DEPOSITION OF BEVERLY PADILLA

VOLUME I

(Pages 1 through 153)

Taken on behalf of the Defendant

February 27, 2007

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EXHIBIT A, P. 149

13:32:31 1 Q. That's what I'm asking.

13:32:34 2 A. No.

13:32:36 3 Q. Did you have any personal relationships
13:32:37 4 with anyone else at Cascadia since the time that you
13:32:41 5 worked for the company?

13:32:42 6 A. No. It better be no.

13:32:48 7 MR. LIVELY: Can we take a break?

13:32:49 8 (Pause in deposition: 1:33 - 1:41 p.m.)

13:41:23 9

13:41:25 10 BY MR. LIVELY: (Continuing)

13:41:46 11 Q. Okay. Before we left off, Ms. Padilla, we
13:41:52 12 talked about the fact that you hadn't been in any
13:41:56 13 other intimate relationships with an employee of
13:41:59 14 Cascadia.

13:42:00 15 In your relationship with Ms. Wilken
13:42:04 16 during the time she was employed with Cascadia, did
13:42:06 17 you ever kiss Ms. Wilken on Cascadia's work
13:42:12 18 premises, meaning in the administration building?

13:42:16 19 A. There might have been an occasion in the
13:42:24 20 admin building in a locked bathroom.

13:42:28 21 Q. When was that?

13:42:33 22 A. That was before we were actually a couple,
13:42:37 23 so it was before February of '05. I don't know -- I
13:42:47 24 don't remember the day or the time or the month, but
13:42:49 25 it was before we were a couple.

13:42:52 1 Q. Did that --

13:42:54 2 A. It wasn't a --

13:42:54 3 Q. I'm sorry.

13:42:57 4 A. It was just a kiss on the cheek.

13:42:58 5 Q. Just a kiss on the cheek?

13:43:00 6 A. Yeah.

13:43:05 7 Q. Why were you kiss -- having a kiss on the

13:43:10 8 cheek in the bathroom?

13:43:12 9 A. We had been trying to make plans to get

13:43:15 10 together to go out for coffee, and because of her

13:43:20 11 schedule, she was often out of the building, because

1 13:23 12 of various things in the billing department, I was

13:43:29 13 busy as well, so we made some time after work to

13:43:34 14 meet in the bathroom which was on the other side of

13:43:37 15 the admin building that had a lock on it, and we met

13:43:41 16 in there to talk about making plans for getting

13:43:44 17 together for coffee.

13:43:46 18 Q. Why did you feel that you needed to meet

13:43:48 19 in a locked bathroom to make plans to have coffee?

13:43:53 20 A. It was a private conversation.

13:43:58 21 Q. Other than a kiss on the cheek during the

13:44:03 22 incident in the bathroom --

13:44:07 23 A. Excuse me, can someone turn off that

13:44:09 24 heater. It's really hot in here.

13:44:12 25 Thank you. Thanks.

13:57:08 1 A. When our attorney showed it to us. I
13:57:11 2 don't know when that was.

13:57:13 3 Q. Well, I don't want you to talk to me about
13:57:14 4 what your attorney did.

13:57:16 5 I'm wondering if prior to the deposition,
13:57:21 6 if you've ever seen the notebook that Exhb. 68 came
13:57:28 7 out of.

13:57:29 8 A. Of course I have.

13:57:30 9 Q. That's what I'm trying to figure out.
13:57:32 10 When I say "a copy of 68," I mean if you've ever
13:57:37 11 seen what's written in Exhb. 68 before.

13:57:40 12 A. Yes.

13:57:40 13 Q. Okay. Is this part of the notebook that
13:57:42 14 you talked about that you purchased so that you and
13:57:45 15 Ms. Wilken could write back and forth to each other?

13:57:48 16 A. It looks like it.

13:57:50 17 Q. Okay. And where was the notebook kept?

13:57:55 18 A. With us.

13:57:55 19 Q. Either one of you?

13:57:57 20 A. Yes.

13:57:59 21 Q. And does that mean it occasionally
13:58:02 22 traveled to work?

13:58:03 23 A. It might have been in the Titan.

13:58:11 24 Q. Did you ever write notes to Ms. Wilken in
13:58:16 25 that -- in the notebook while you were at the

14:05:07 1 employee appreciation picnic, but the rest of the
14:05:12 2 time, she would continue harassing both of us and I
14:05:21 3 didn't want to go and I made that clear to her.

14:05:24 4 Q. Was the picnic something that all your
14:05:27 5 coworkers in the billing department were invited to?

14:05:31 6 A. Yes.

14:05:31 7 Q. As well as you?

14:05:32 8 A. Yes.

14:05:32 9 Q. Did you attend the picnic?

14:05:34 10 A. Absolutely not.

14:05:39 11 Q. Are you aware of whether any of your other
14:05:42 12 coworkers in the billing department failed to attend
14:05:46 13 the picnic?

14:05:47 14 A. I don't know.

14:05:55 15 Q. Ms. Padilla, I'd like you to look at
14:05:58 16 what's been marked as Exhb. 72. Once you're
14:06:01 17 finished reading it, please let me know.

14:06:33 18 A. Okay.

14:06:33 19 Q. Prior to today, have you seen Exhb. 72 as
14:06:38 20 part of a notebook?

14:06:40 21 A. Yes.

14:06:41 22 Q. And do you recall whether you received it
14:06:43 23 on or around 6-21 of '05, or 5-21 of '05?

14:06:51 24 A. I think it's May.

14:06:58 25 Q. 5-21 of '05?

14:06:58 1 A. I think so.

14:06:58 2 Q. And was it your understanding that the
14:06:59 3 contents of Exhb. 72 was addressed to you?

14:07:01 4 A. Yes.

14:07:01 5 Q. And do you recognize Exhb. 72 as being
14:07:05 6 Ms. Wilken's handwriting?

14:07:08 7 A. Yes.

14:07:08 8 Q. And do you recall the event that is
14:07:12 9 referenced on the first page of Exhb. 72?

14:07:16 10 A. Yes.

14:07:16 11 Q. What do you recall about that?

14:07:17 12 A. It was a night that Janette was working
14:07:22 13 late on some files that she needed to get done and
14:07:28 14 she was in the housing department, and since I
14:07:31 15 wasn't allowed to be in there, I was in the billing
14:07:34 16 department just -- I don't remember what I was
14:07:38 17 doing, just killing time.

14:07:43 18 Q. Do you recall anything else about that?
14:07:53 19 How did you prove that it's possible to hide in
14:07:55 20 three inches of wall space?

14:07:58 21 A. When Janette was done for the evening, it
14:08:01 22 was pretty late, so she came over to the billing
14:08:04 23 department to get me to go home, and this hiding in
14:08:12 24 three inches of wall space, we were making fun of
14:08:16 25 the rule that Audrey had instituted that Janette

14:08:20 1 couldn't come into my cubicle and lean against my
14:08:24 2 desk, because people might think that she was
14:08:27 3 hiding, and if she were seen as hiding in my
14:08:31 4 cubicle, people might think that we were doing
14:08:34 5 something, so we were trying to see if it was, in
14:08:37 6 fact, possible to hide.

14:08:39 7 I had measured the part of the wall that
14:08:42 8 Audrey claimed that Janette could hide behind and it
14:08:47 9 measured out to be three inches, so neither one of
14:08:50 10 us being small people, we were going to see if, in
14:08:54 11 fact, it was possible to hide in three inches of
14:08:57 12 wall space, so I was sitting on the -- in the corner
14:09:01 13 of my cubicle -- it's not a desk so much as a space
14:09:08 14 that wraps around, and where it wraps around on the
14:09:11 15 left side, there was the three inches of wall
14:09:13 16 hanging out, so I was sitting in that area trying to
14:09:16 17 see if I could hide, and low and behold, it wasn't
14:09:20 18 possible for either one of us to do that.

14:09:29 19 Q. What is the reference to your pearl being
14:09:32 20 exposed?

14:09:38 21 A. Well, I think what she might have been
14:09:41 22 talking about there was that in the position that I
14:09:44 23 was on the desk, she walked towards me and spread my
14:09:54 24 legs out with her hands and, you know, it was late,
14:10:02 25 we were tired, we both wanted to go home, and at

14:10:05 1 that point, I just said, "We need to take this
14:10:09 2 home."

14:10:11 3 Q. When you say "We need to take this home,"
14:10:14 4 what does that mean?

14:10:16 5 A. Well, I picked up from Janette that she
14:10:21 6 was maybe in a romantic mood. I wasn't going to do
14:10:29 7 anything. We weren't going to do anything there at
14:10:32 8 work and we didn't. We -- she basically just put
14:10:37 9 her hands on my knees, spread my legs apart. I
14:10:41 10 don't remember if she -- she might have run her hand
14:10:45 11 down the inside of my leg or something, I don't
14:10:48 12 remember what happened after that, but I remember I
14:10:50 13 grabbed her hand and said, "Let's go home."

14:10:55 14 Q. Was Ms. Wilken pressed up against you at
14:10:59 15 that time?

14:11:00 16 A. I don't remember. She might have been.

14:11:08 17 Q. Do you recall whether Ms. Wilken during
14:11:10 18 this incident touched you in the genital area?

14:11:18 19 A. It's possible that her hand might have
14:11:20 20 gone down that far. Like I said, I think she ran
14:11:24 21 her hand down the inside of my thigh. She might
14:11:28 22 have reached that area, but that's as far as it
14:11:31 23 went. Both of us were fully clothed.

14:11:49 24 Q. Okay. You can set that aside.

14:11:55 25 And Ms. Padilla, I'd like you to look at

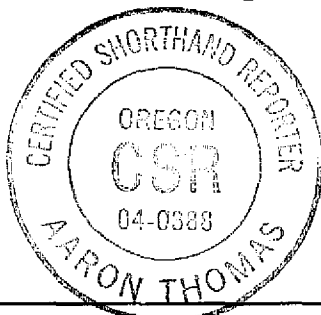
1 STATE OF OREGON)

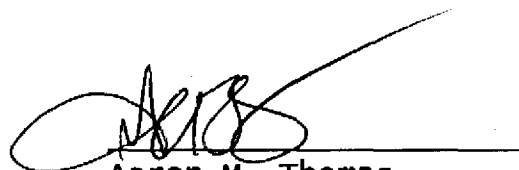
2 County of Multnomah)

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3
4 I, Aaron M. Thomas, Certified Shorthand
5 Reporter, Registered Professional Reporter, and
6 Notary Public for the State of Oregon, do hereby
7 certify that BEVERLY PADILLA personally appeared
8 before me at the time and place mentioned in the
9 caption herein; that the witness was by me first
10 duly sworn on oath and examined upon oral
11 interrogatories propounded by counsel; that said
12 examination, together with the testimony of said
13 witness, was taken down by me in stenotype and
14 transcribed through computer-aided transcription;
15 and that the foregoing transcript constitutes a
16 full, true and accurate record of said examination
17 of and testimony given by said witness, and of all
18 other oral proceedings had during the taking of said
19 deposition, and of the whole thereof.

20 Witness my hand and Notarial Seal at
21 Portland, Oregon, this 5th day of March, 2007.




Aaron M. Thomas
Oregon CSR 04-0388

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JANETTE M. WILKEN, an
individual,

Plaintiff,

v.

CASCADIA BEHAVIORAL
HEALTHCARE, INC., an Oregon
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Defendant.

No. 06195 ST

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VIDEOTAPED DEPOSITION OF JANETTE M. WILKEN

VOLUME II

(Pages 215 through 289)

Taken on behalf of the Defendant

February 27, 2007

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EXHIBIT B, P. 1 of 16

10:00:35 1 Q. And do you know where you were when you
10:00:37 2 gave Exhb. 68 to Ms. Padilla?

10:00:40 3 A. I don't recall.

10:00:41 4 Q. And were the statements made in Exhb. 68
10:00:46 5 accurate at the time that you made them?

10:00:50 6 A. Yes.

10:00:54 7 Q. Now, I will submit to you that based on
10:00:55 8 the information that we received regarding this
10:01:00 9 note, it looks like there's notes from you and from
10:01:03 10 Ms. Padilla, I don't know if they're going back and
10:01:06 11 forth, but in your hand and I'm assuming in your
10:01:09 12 hand.

10:01:09 13 Was -- the notebook that contained -- it
10:01:12 14 looks like a spiral notebook that contained
10:01:14 15 Exhb. 68, was that something you and Ms. Padilla
10:01:23 16 shared?

10:01:23 17 A. Yes.

10:01:23 18 Q. Would it be something, for lack of a
10:01:23 19 better word, that was passed back and forth between
10:01:27 20 you and Ms. Padilla?

10:01:29 21 A. Yes.

10:01:30 22 Q. And was that generally passed back and
10:01:31 23 forth at work?

10:01:32 24 A. No.

10:01:33 25 Q. Where would the notebook be passed back

10:01:35 1 and forth?

10:01:36 2 A. At any time.

10:01:37 3 Q. Was it something that one of you carried
10:01:39 4 with you?

10:01:41 5 A. One or the other.

10:01:43 6 Q. Okay. I'm just trying to understand if
10:01:45 7 Exhb. 68 was a notebook that was kept at work or
10:01:48 8 carried with somebody or how that -- how that went.

10:01:57 9 A. I don't understand your question.

10:01:58 10 Q. Sure.

10:01:59 11 It looks like Exhb. 68 is part of a spiral
10:02:02 12 notebook, and what I'm wondering is was that spiral
10:02:05 13 notebook something that either you or Ms. Padilla
10:02:10 14 kept on yourselves at all times and traveled with
10:02:13 15 one of you, or was it something that was left in a
10:02:16 16 drawer at work or something other than one of those
10:02:20 17 two?

10:02:21 18 A. It was -- it traveled with us. We would
10:02:24 19 take it wherever we went, whether that be to work or
10:02:28 20 to the beach.

10:02:29 21 Q. Okay. So it might have gone to work, but
10:02:33 22 it might have -- Exhb. 68 might have gone to work or
10:02:36 23 it might have gone other places as well?

10:02:38 24 A. Yes.

10:02:38 25 Q. The binder, I should say, the notebook.

10:04:16 1 mean anything to you?

10:04:17 2 A. No.

10:04:20 3 Q. So why did you write it?

10:04:21 4 MR. BRISCHETTO: Objection; asked and
10:04:22 5 answered.

10:04:23 6 Go ahead.

10:04:24 7 A. This is a personal diary, what's written
10:04:28 8 in it is -- part of it is to console each other. I
10:04:39 9 don't want her to feel bad about something or to
10:04:41 10 take it on and have to, you know, be angry about
10:04:47 11 something, so in a sense, I'm trying to console so
10:04:54 12 that she doesn't feel so bad.

10:04:56 13 Q. And the "she" is Ms. Padilla?

10:05:00 14 A. Ms. Padilla, yes.

10:05:05 15 Q. So let me make sure that I understand
10:05:07 16 this.

10:05:07 17 Even though you didn't necessarily agree
10:05:10 18 personally with the statement that in the grand
10:05:13 19 scheme of things, this didn't mean anything to you,
10:05:15 20 you were writing that in your diary to essentially
10:05:18 21 help Ms. Padilla feel better about the situation?

10:05:22 22 MR. BRISCHETTO: Objection; asked and
10:05:23 23 answered; inaccurate summary of the testimony.

10:05:26 24 Go ahead.

10:05:29 25 A. The thing that was important was us and

10:14:43 1 to the time Exhb. 69 was created?

10:14:52 2 A. I -- I don't recall.

10:14:54 3 Q. And had you held hands in the building at
10:14:58 4 the time -- prior to the time Exhb. 69 was created?

10:15:02 5 A. I don't recall.

10:15:04 6 Q. And had you otherwise touched each other,
10:15:07 7 you and Ms. Padilla, in the building prior to the
10:15:10 8 time Exhb. 69 was created?

10:15:12 9 A. I don't recall.

10:15:16 10 Q. Do you recall if you kissed Ms. Padilla in
10:15:20 11 the building at any time after Exhb. 69 was created?

10:15:24 12 A. I don't recall.

10:15:26 13 Q. Do you recall if you kissed Ms. Padilla in
10:15:29 14 the building at any time while you were employed at
10:15:32 15 Cascadia?

10:15:40 16 A. Possibly.

10:15:41 17 Q. And --

10:15:44 18 A. I believe on one occasion.

10:15:45 19 Q. And do you know when that was?

10:15:51 20 A. I believe it was in the bathroom on the
10:15:55 21 other side of the building before we were together
10:15:59 22 as a couple.

10:16:02 23 Q. What does "in the bathroom on the other
10:16:05 24 side of the building" mean?

10:16:07 25 A. There was a private bathroom that had a

10:16:09 1 lock on it, so if you -- and it was over on the
10:16:12 2 accounting side of the building, so for whatever
10:16:15 3 reason --

10:16:18 4 Q. And you stated this was before you were
10:16:21 5 together as a couple.

10:16:23 6 My understanding is that you became a
10:16:24 7 couple sometime in February of 2005.

10:16:28 8 Is that accurate?

10:16:28 9 A. Yes.

10:16:31 10 Q. So could this have been January of 2005
10:16:34 11 that the kissing in the bathroom occurred, or could
10:16:39 12 it have been prior to that?

10:16:40 13 A. Probably.

10:16:44 14 Q. Was it likely that the kissing in the
10:16:46 15 bathroom occurred sometime between December of 2004
10:16:49 16 and February of 2005?

10:16:51 17 A. Yes.

10:16:57 18 Q. And did anything happen in the bathroom
10:16:59 19 other than a kiss?

10:17:01 20 A. A hug.

10:17:05 21 Q. Anything other than a kiss and a hug?

10:17:08 22 A. We had a conversation about meeting at a
10:17:09 23 coffee shop after work.

10:17:12 24 Q. But no other physical contact other than a
10:17:15 25 kiss --

10:17:15 1 A. No.

10:17:16 2 Q. -- and a hug?

10:17:17 3 Is that a "no"?

10:17:23 4 A. "No."

10:17:25 5 Q. And do you recall holding hands at any
10:17:27 6 times on Cascadia work premises with Ms. Padilla
10:17:32 7 while you worked for Cascadia?

10:17:35 8 A. I don't recall.

10:17:35 9 Q. You just don't recall one way or the other
10:17:37 10 or you don't think it happened?

10:17:39 11 MR. BRISCHETTO: Objection; calls for
10:17:40 12 speculation.

10:17:40 13 Go ahead.

10:17:42 14 A. I don't recall.

10:17:42 15 Q. And do you recall touching Ms. Padilla in
10:17:46 16 any way other than what you've already described in
10:17:49 17 the bathroom at any time during the period that you
10:17:52 18 were employed by Cascadia?

10:17:55 19 A. Yes.

10:17:57 20 Q. Tell me about that, what do you recall?

10:17:59 21 A. There was an evening that I worked late.

10:18:03 22 It was prior to July 1st of '05, because that was
10:18:10 23 when I changed from a salaried employee to an hourly
10:18:15 24 employee, so I was still hourly, but not -- no, I
10:18:20 25 was still salary, excuse me, not getting paid for

10:18:24 1 overtime, but I was there late, it was 9:15, 9:30;
10:18:29 2 somewhere in there.

10:18:31 3 Ms. Padilla was in her department at her
10:18:36 4 cubicle reading a book waiting for me. I was in the
10:18:40 5 housing department working, and when I got done, I
10:18:45 6 walked over to billing and knocked on the door and
10:18:50 7 she answered the door and I said, "Let's go," and
10:18:54 8 she responded in a way that was, you know, "About
10:19:01 9 time," you know, and I felt bad that she had to wait
10:19:05 10 so long for me.

10:19:18 11 I went back over to her cubicle to gather
10:19:21 12 up her things. I'm not -- I'm not recalling what
10:19:29 13 led up to it, but she had leaned up against her desk
10:19:34 14 and we were joking with each other about her hiding
10:19:38 15 behind the three inches of wall that they accused us
10:19:43 16 of hiding behind, and so we were making fun of their
10:19:56 17 rules and so she scooted up on to the desk trying to
10:20:04 18 hide and I came in close to her and I spread her
10:20:07 19 legs apart and, you know, tried to hide in that
10:20:13 20 three inches of wall with her.

10:20:23 21 Q. Did anything else happen other than you
10:20:27 22 spreading her legs apart and trying to hide in that
10:20:31 23 incident?

10:20:32 24 A. I don't recall anything else except that
10:20:36 25 it was time to go home and she looked at me and

10:20:39 1 said, "Let's go home."

10:20:41 2 Q. Was any part of Ms. Padilla's body exposed
10:20:47 3 during that incident?

10:20:48 4 A. No.

10:20:50 5 Q. Were any part of her clothes removed
10:20:52 6 during that incident?

10:20:53 7 A. No.

10:21:02 8 Q. Other than the bathroom hug and this
10:21:04 9 incident that you've just described, and did you say
10:21:06 10 that was in your office or her office?

10:21:09 11 A. Hers.

10:21:12 12 Q. Any other touching that you and
10:21:15 13 Ms. Padilla engaged in on the work premises during
10:21:24 14 the time that you were employed by Cascadia?

10:21:27 15 A. I recall one other time when I was at my
10:21:32 16 desk, she came over to talk about -- she made a
10:21:39 17 doctor's appointment for me, I think, and she had
10:21:41 18 her hand on my knee. She was knelt down, you know,
10:21:48 19 next to me and had her hand on my knee so that we
10:21:52 20 could have a private -- you know, a quick, private
10:21:55 21 conversation about the doctor's appointment that she
10:21:57 22 made for me.

10:21:58 23 Q. During that incident, was any part of your
10:22:01 24 or Ms. Padilla's private body parts exposed?

10:22:07 25 A. No.

10:22:10 1 Q. And were either your or Ms. Padilla's
10:22:15 2 clothes removed during that incident?

10:22:17 3 A. No.

10:22:19 4 Q. Other than the bathroom incident that
10:22:21 5 we've discussed, the incident in her office and this
10:22:27 6 one that you've just related to me with her hand on
10:22:30 7 your knee, any other instances of you and
10:22:33 8 Ms. Padilla touching each other in the workplace
10:22:38 9 while you were employed by Cascadia?

10:22:40 10 A. Not that I recall.

10:22:41 11 Q. Why did you create Exhb. 69?

10:23:19 12 A. I don't know that I can answer that. I --
10:23:22 13 it was a brief communication with Bev.

10:23:40 14 Q. You actually just answered my next
10:23:42 15 question.

10:23:43 16 Who was Exhb. 69 written to?

10:23:45 17 A. Bev.

10:23:46 18 Q. Bev Padilla?

10:23:48 19 A. Yes.

10:23:48 20 Q. And did you, in fact, give Exhb. 69 to Bev
10:23:52 21 Padilla while you were employed by Cascadia?

10:23:55 22 A. Yes.

10:23:55 23 Q. And do you know where you were when you
10:23:57 24 drafted Exhb. 69?

10:23:58 25 A. No.

10:43:50 1 Ms. Wilken, the court reporter has handed
10:43:52 2 you what's been marked as Exhb. 72. I would like
10:43:55 3 you to read it over and let me know when you're
10:44:01 4 finished.

10:44:37 5 A. Okay.

10:44:39 6 Q. And is the handwriting on Exhb. 72 your
10:44:43 7 handwriting?

10:44:44 8 A. Yes.

10:44:46 9 Q. And the date on the top right, it appears
10:44:50 10 to be 6-21-05, but I can't tell if it's 6-21-05 or
10:44:57 11 5-21-05.

10:44:59 12 Can you tell which date it is?

10:45:02 13 A. I believe it's 6-21-05.

10:45:05 14 Q. And did you create Exhb. 72 on or near
10:45:10 15 6-21-05?

10:45:13 16 A. Probably.

10:45:13 17 Q. Do you have any reason to doubt that you
10:45:15 18 created Exhb. 72 at a time other than on or around
10:45:19 19 6-21-05?

10:45:22 20 A. No.

10:45:23 21 Q. And where were you when you wrote
10:45:26 22 Exhb. 72?

10:45:33 23 A. I don't recall.

10:45:36 24 Q. And the reference in Exhb. 72 says, "Oh,
10:45:42 25 Babe."

10:45:43 1 Is that in reference to Ms. Padilla?

10:45:45 2 A. Yes.

10:45:46 3 Q. And did you, in fact, give Ms. Padilla a

10:45:50 4 copy of Exhb. 72?

10:45:52 5 A. Yes.

10:45:52 6 Q. And do you know where you were when you

10:45:54 7 gave Ms. Padilla a copy of Exhb. 72?

10:45:58 8 A. No.

10:46:00 9 Q. Could you have been at work?

10:46:02 10 A. Yes.

10:46:03 11 Q. And at the time you wrote Exhb. 72, were

10:46:12 12 the statements made in that exhibit accurate to the

10:46:15 13 best of your knowledge?

10:46:24 14 A. Accurate within the context, yes.

10:46:30 15 Q. What does that mean, "Accurate within the

10:46:33 16 context"?

10:46:38 17 A. Meaning if someone unrelated would read

10:46:41 18 this, it can sound like something that it may not

10:46:48 19 have been between the two of us.

10:46:50 20 Q. Why did you write Exhb. 72?

10:46:58 21 A. The notebook were personal thoughts

10:47:01 22 between Ms. Padilla and myself. We would write what

10:47:09 23 we wanted to write.

10:47:12 24 Q. Were you describing an event that had

10:47:17 25 occurred in Exhb. 72?

10:51:07 1 That being said, "work" based on what else
10:51:12 2 is said here was -- again, making reference to their
10:51:21 3 ridiculous rules and assumptions about what we did,
10:51:27 4 you know, behind closed doors or when nobody else
10:51:31 5 was there.

10:51:33 6 Q. So it's your testimony under oath that
10:51:38 7 your use of the term "work" with quotes around it
10:51:45 8 isn't referring to you and Ms. Padilla engaging in
10:51:49 9 conduct at the workplace other than work?

10:51:51 10 A. No.

10:51:55 11 Q. Explain that to me. Actually, move to
1 11:57 12 strike.

10:51:58 13 Are you by using the term "work" with
10:52:00 14 quotes referring to conduct that you and Ms. Padilla
10:52:04 15 engaged in at the workplace other than work?

10:52:07 16 A. No.

10:52:21 17 Q. The next sentence states, "I think we've
10:52:25 18 proved that" -- excuse me, let me strike that and
10:52:28 19 restart.

10:52:29 20 "I think we proved that it is possible to
10:52:32 21 hide in three inches of wall space. You were very
10:52:37 22 well tucked in that three inches with your 'pearl'
1 10:52:41 23 exposed."

10:52:46 24 What does the reference that "it is
10:52:48 25 possible to hide in three inches of wall space"

10:52:53 1 refer to?

10:52:53 2 A. Again, we were making fun of the rules
10:52:56 3 that they had made. I had come over after I was
10:53:00 4 done doing my work to tell her it was time to go.
10:53:04 5 When she leaned up against the table, we were
10:53:07 6 talking about hiding behind the three inches of
10:53:10 7 wall.

10:53:13 8 You know, we -- she -- she sat on her desk
10:53:18 9 and I took her legs and moved them apart and got in
10:53:21 10 very close to see if we could hide. We were making
10:53:24 11 fun of their rules. I was making fun of their
10:53:27 12 rules.

10:53:27 13 Q. And were you able to hide behind the three
10:53:32 14 inches of wall space in the manner you've just
10:53:36 15 described?

10:53:36 16 A. No. It was sarcastic.

10:53:42 17 Q. So it's your testimony under oath that by
10:53:45 18 stating "I think we proved that it is possible to
10:53:49 19 hide in three inches of wall space," that you were
10:53:56 20 actually stating the opposite?

10:53:59 21 A. It was sarcastic.

10:54:08 22 Q. What is the reference to your quote -- her
10:54:13 23 "pearl" being exposed, what is that regarding?

10:54:23 24 A. A pearl in this case is referring to her
10:54:30 25 genital area. By exposing it, I was -- again, it

10:54:36 1 was sarcastic, but in the sense that I spread her
10:54:40 2 legs to expose.

10:54:45 3 Q. Okay. Is the pearl a reference to a
10:54:49 4 clitoris?

10:54:51 5 A. Yes.

10:54:52 6 Q. And so your reference there was -- sorry,
10:54:55 7 strike that.

10:54:56 8 So it's your testimony that using the term
10:54:59 9 "pearl exposed" meant with her clothing on, but
10:55:05 10 spreading her legs?

10:55:06 11 A. That's how I meant it, yes.

10:55:09 12 Q. The next sentence states, "And oh how I
10:55:13 13 enjoy rolling your 'pearl' around."

10:55:23 14 What is that in reference to?

10:55:27 15 A. I don't recall that, but I'm guessing that
10:55:31 16 I reached down, and on top of her clothing, fondled
10:55:40 17 her.

10:55:42 18 Q. And then the last -- and again, "pearl" is
10:55:47 19 in reference to a clitoris in that sentence?

10:55:50 20 A. Yes.

10:55:50 21 Q. The next sentence states, "Maybe next time
10:55:55 22 you can sit in your chair."

10:55:58 23 What is that in reference to?

10:56:17 24 A. Just that maybe next time, instead of
10:56:19 25 trying to hide behind three inches of wall, that

1 STATE OF OREGON)

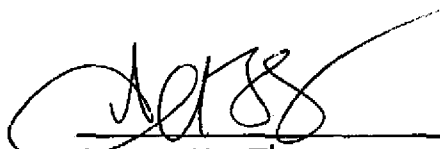
2 County of Multnomah)

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3
4 I, Aaron M. Thomas, Certified Shorthand
5 Reporter, Registered Professional Reporter, and
6 Notary Public for the State of Oregon, do hereby
7 certify that JANETTE M. WILKEN personally appeared
8 before me at the time and place mentioned in the
9 caption herein; that the witness was by me first
10 duly sworn on oath and examined upon oral
11 interrogatories propounded by counsel; that said
12 examination, together with the testimony of said
13 witness, was taken down by me in stenotype and
14 transcribed through computer-aided transcription;
15 and that the foregoing transcript constitutes a
16 full, true and accurate record of said examination
17 of and testimony given by said witness, and of all
18 other oral proceedings had during the taking of said
19 deposition, and of the whole thereof.

20 Witness my hand and Notarial Seal at
21 Portland, Oregon, this 7th day of March, 2007.




Aaron M. Thomas
Oregon CSR 04-0388

CERTIFICATE OF SERVICE

I hereby certify I served the foregoing **PLAINTIFF'S MOTIONS *IN LIMINE*** on:

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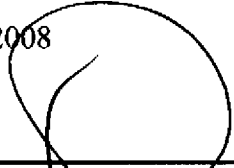
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by delivering this date to said attorney(s) a true copy thereof as stated above. I further certify that said documents were contained in sealed envelopes, addressed as above stated, to the last-known addresses of said attorney(s). Documents delivered by mail were deposited in the post office at Portland, Oregon with postage thereon prepaid.

DATED: June 9, 2008



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